

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of San Diego
(County File No. 122-SCP-SD-10/11)

Docket. No. S-022

**License-To-Kill
Termite and Pest Control Specialist
Attn: Vincent Gomez
3755 Avocado Blvd., #300
La Mesa, California 91941**

DECISION

Appellant/

Procedural Background

Pursuant to Business and Professions Code (BPC) section 8617, and Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) may levy a civil penalty up to \$5,000 for a violation of California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Diego CAC found that License-To-Kill (Appellant or LTK) violated California Code of Regulations, Title 3 (3CCR), section 6600 by failing to perform pest control in a careful and effective manner by not following the local gas company's required procedures for proper gas shut off. The CAC found that this failure created an actual health and environmental hazard, and based in part on the company's failure to follow required procedures for proper gas shut off 16 times from March to August 2010, levied a fine at the maximum amount of \$5,000.00.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (DRC or Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were John Tengan for the structural pest control industry, Susan Saylor for the Structural Pest Control Board (SPCB), and Jodi Clary for the Department of Pesticide Regulation (DPR). Although License-To-Kill requested oral argument, the Committee determined oral argument was not necessary because of the extensive briefing of the issues, and the detailed argument presented at hearing before the Hearing Officer¹.

¹ The record contains extensive briefing by both parties on the issues of jurisdiction, authority, and fine level. LTK filed a complaint with the CAC dated August 16, 2010 attacking the inspection procedures and other issues and demanding the citations be dropped. The CAC answered in a document dated September 13, 2010. The Hearing Officer requested the parties brief the jurisdictional, authority and fine issues. LTK's brief was dated March 28, 2011, the CAC's response was dated April 5, 2011. LTK submitted its request for appeal including written argument discussing these same issues in support of its request that the violation and fine be dropped dated June 29, 2011. In response to the DRC notice, LTK submitted written argument dated September 1, 2011, and the CAC submitted very brief written argument dated August 11, 2011. Both sides argued their respective positions at hearing on March 16, 2011.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Factual Background

On August 12, 2010, LTK performed a fumigation on a residential structure using the pesticide Master Fume, EPA registration number 19713-596 (99.8% Sulfuryl fluoride). The San Diego CAC conducted a Branch 1 Aeration Structural Fumigation Use Monitoring inspection on August 13, 2010. The CAC's inspectors determined that LTK performed the natural gas shut off, and thus failed to follow San Diego Gas and Electric's (SDG&E) required procedures that trained utility employees only are to perform the natural gas shut off.

The pesticide label submitted by LTK as evidence as found on the Master Fume cylinders has the following statements under the heading *Use Precautions*: "Extinguish all flames, including pilot lights of water heaters, gas refrigerators, ranges, ovens, broilers, dryers, gas fireplaces, etc." The full label on file with DPR, contains the following language under the heading *Physical and Chemical Hazards*: "Contact your local gas company to determine what procedures should be followed in your area for shutting off natural gas or propane service."

The CAC issued a Notice of Proposed Action (NOPA) on October 5, 2010, and proposed to fine LTK at the maximum of the "serious" level at \$5,000.00. The NOPA charged LTK with one violation of 3 CCR section 6600 for failing to perform pest control in a careful and effective manner. LTK requested a hearing that was held on March 16, 2011. After hearing the evidence, the Hearing Officer found that LTK violated 3 CCR section 6600 and that the fine in the serious range was justified.

LTK filed this appeal before the Disciplinary Review Committee.

Applicable Statutes and Regulations

California Code of Regulations section 6600 (b) (General Standards of Care) states that each person performing pest control shall perform all pest control in a careful and effective manner.

CCR, title 16, section 1922 defines a “serious” violation as one that is a repeat moderate violation or a violation which created an actual health or environmental hazard. The fine range for serious violations is \$700-\$5,000.

Appellant's Contentions

The Appellant states three grounds for his appeal. He asserts that the CAC does not have authority to enforce San Diego Gas & Electric Company policies, and does not have the jurisdiction to hear violations of SDG&E policies. Appellant asserts that the investigation, and enforcement action taken by the CAC violates his due process rights, and objects to the admission of certain evidence as a further due process violation. The Appellant also asserts that the fine level should be placed in the minor category because there was no creation of an actual health or environmental hazard.

The Hearing Officer's Determination

At hearing, LTK stipulated that the factual statements found in the NOPA were true, specifically that SDG&E had not performed the natural gas shut off prior to the fumigation. The Hearing Officer determined that LTK's liability depended on a legal finding that the San Diego CAC had jurisdiction and authority in this particular case. The Hearing Officer required both parties to submit detailed briefs to him addressing the jurisdiction and authority issues.

The Hearing Officer found that while the CAC may not have authority to enforce SDG&E's policies directly, this case involves enforcing mandates from State and Federal agencies. California law requires that each person performing pest control shall do so in a careful and effective manner. California law prohibits the use of any pesticide that conflicts with its label (FAC section 12973). As a result of two fumigation related gas accidents, the California Public Utilities Commission issued resolutions to establish a required practice that only trained SDG&E employees were to shut-off and activate customer gas meters.² The label for Master Fume, at page 37, requires the fumigator to contact the local gas company to determine what procedures must be followed in the area. While the Hearing Officer noted that there was no specific statute on the books that states “A fumigator must use the employees of the local gas

² SDG&E owns the natural gas meter and the service line to the street. The resolution rescinded the past practice of allowing the fumigator to shut off the gas and instead required trained SDG&E technicians to shut off and turn on the gas.

company to shut-off gas lines prior to fumigation”, the Hearing Officer found that together the Department of Transportation³, CPUC, SDPG&E, and DPR have established legally binding requirements that fumigators must follow and that may be enforced by the CAC through 3 CCR section 6600 and its requirement that pest control be performed in a careful and effective manner. Thus, the Hearing Officer concluded, the CAC has jurisdiction to hear the violation of SDG&E policy in this particular case.

Appellant objected to the hearing on grounds that the CAC violated his due process rights regarding its investigation, enforcement, and evidence presented at hearing. The Hearing Officer found that Appellant’s briefing contained vague generalities and did not establish a due process violation. The main concern of the Appellant as to his due process appeared to center on his objection to the CAC’s use of 16 incidents of failing to have SDG&E employees perform gas shut-off at LTK fumigation sites as a factor in establishing the fine level. The Hearing Officer rejects this contention as a due process violation in that the 16 incidents were not charged as violations but are only used to demonstrate a pattern of behavior to establish aggravating circumstances. The Hearing Officer found that the admission of the evidence establishing these incidents was not a violation of due process. Evidence cited by the Appellant as submitted after hearing was not admitted so that a violation of due process did not occur then either, and the request for a mistrial was denied. The Hearing Officer discussed the fundamental component of due process as being *notice*, and found that the evidence demonstrated that LTK had notice of the requirement to use utility company employees for gas shut off but chose to ignore the requirements.

Lastly, the Hearing Officer outlined the two reasons for his finding that the offense was properly categorized as “serious”. The first reason was the recognition of the potential of an explosion from an inappropriately shut-off gas main trapping natural gas under the tarp, as evidenced by explosions in Northern and Southern California. The Hearing Officer stated: “The actual health or environmental hazard is therefore set in motion by failure to follow the law, and need not manifest itself in an actual explosion during the fumigation process.” The second reason cited by the Hearing Officer to support the fine in the serious range was LTK’s arrogance and disregard of the regulation. The Hearing Officer discussed evidence in the record that established that LTK’s training, the product’s label, and business licensing put LTK on notice of the requirement to contact the local gas company for gas shut-off. The Hearing Officer noted that LTK in fact had contacted SDG&E to request shut-off but when SDG&E failed to respond to LTK’s time table, LTK made a business decision to shut off the gas itself. The Hearing Officer found such behavior indicates a conscious disregard for the customer and community at large, “and as such is Serious”.

³ The Hearing Officer noted that additional authority came from the need to comply with Department of Transportation guidelines, Federal Code of Regulations, Title 49, Part 192, Subpart N. Effective October 28, 2002, the DOT regulation terminated the fumigation contractor’s authorization to shut off and restore gas meter service before and after performing tented fumigation jobs.

Analysis

The Hearing Officer quite properly made the legal determination that the CAC has the authority and jurisdiction to prosecute LTK for violating the California regulation for failing to perform pest control in a careful and effective manner. The evidence established the CPUC resolution requires gas shut-off be accomplished by trained utility employees, the Federal regulation establishes the same requirement, and the product label requires that the applicator contact local utilities to determine proper shut off procedures. California law requires that the label be followed (FAC 12973). Coupled with the legal requirement that fumigation shall be performed in compliance with all applicable state, county, and city laws and ordinances and all applicable laws and regulations of the United States (Business and Professions Code section 8505.4), it is very clear that LTK was legally obligated to follow SDG&E's policy for gas shut off under state and federal mandates. The CAC has the jurisdiction and authority to prosecute LTK for its failure to perform pest control in a careful and effective manner based on its disregard for SDG&E policy, federal regulation and state laws and regulations.

LTK argued that it complied with all laws and regulations and did not commit a violation. LTK's main argument was that the "label is the law" and no specific statute or regulation requires it to contact utility companies to perform gas shut off. LTK argues that it therefore only need comply with the wording on the partial label found on the gas cylinders and nothing else. This is a dangerous and arrogant position to take. The handling and application of fumigants is a complicated and dangerous endeavor requiring extensive training and compliance with a multitude of laws and regulations, as noted above.

The record shows that LTK owner Vincent Gomez and his employees attended the Master Fume Specialty Gas Fumigant Stewardship Program on January 14, 2010. That program included discussion of the product label, and the requirement that the applicator was to make arrangements with the gas company for gas shut off. LTK was aware of and is charged with knowing the requirements of the full label.

The record in fact shows that LTK faxed in a request for gas shut-off for August 11, 2010. The form indicates a faxed confirmation would be sent but such a confirmation was not offered into evidence. The SDG&E employee testified that the company supplies an 800 number for companies to call if the gas is not shut off at the requested time, and a technician will be dispatched immediately to do so. LTK argued that it was allowed to shut off the gas under emergency circumstances and that they followed the SDG&E procedures for emergency shut off. The emergency was argued to be the closing of escrow. The Hearing Officer properly rejected the circumstances as an emergency and made a finding at hearing that money is not an emergency situation. LTK also argued that since the unidentified Table of Contents submitted as evidence by the County (Exhibit P) contains language that the utility must react and terminate service on the date requested, it is allowed to perform gas shut off if the utility has failed to react. This position was also rejected by the Hearing Officer and the Committee concurs. The policy has been developed to protect the community and cannot be ignored if inconvenient for the fumigator. The fumigator must call the 800 number and obtain proper shut-off, or reschedule.

LTK is incorrect in thinking that no regulation requires him to contact a utility worker to perform gas shut off. 3 CCR 6600(b) requires it to perform pest control in a careful manner. Following SDG&E's policy is required to perform pest control in a careful manner. B&P Code section 8505.4 also makes LTK responsible for following local laws and regulations.

The DRC agrees with the Hearing Officer's rulings and the CAC's imposition of jurisdiction and authority in this matter. LTK stipulated to the facts of the NOPA and is in violation of 3 CCR 6600(b). The record supports the violation as well.

The record does not however support Appellant's arguments that his due process rights were violated. Due Process is the concept that a party cannot be deprived of life, liberty or property without notice and an opportunity to be heard. LTK was provided a Notice of Proposed Action (NOPA) that put it on notice that it would be charged with a violation, included the basis of the violation, and stated the proposed fine. The NOPA included notice that the CAC would be using 16 incidents of failing to contact the gas company for shut-off services as a basis for proposing a fine in the "serious" category at the maximum. LTK was given an opportunity to be heard on all issues through a hearing and significant written arguments to contest all the issues, including the 16 incidents, and in fact vigorously argued its position on all issues. No evidence was admitted after the hearing. LTK received due process.

A violation is placed in the "serious" category when it creates an actual health or environmental hazard. The DRC agrees with the Hearing Officer and CAC that this does not mean the violation cannot be considered serious unless an explosion occurs. LTK's conscious disregard for a very important policy to protect public safety and the fact that it routinely disregarded this policy establishes a pattern of practice that does create an actual health or environmental hazard. LTK's attitude that if the gas company cannot "provide acceptable times", it would do the shut-off itself is an arrogant and unreasonable disregard for public safety, and justifies the imposition of the fine at the serious level. Placing the fine at the high end of the range is squarely within the discretion of the CAC. The DRC finds that the fine at \$5,000 is appropriate.

Conclusion

The record demonstrates that the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The San Diego CAC's decision is affirmed. The Commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The \$5,000.00 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

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Structural Pest Control Board
2005 Evergreen Street, Suite 1500
Sacramento, CA 95815

Judicial Review

BPC section 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: October 3, 2011

By: Jodi Clary
Jodi Clary, Member
For the members of the Disciplinary
Review Committee